United Nations CCPR/C/SR.2255

International Covenant on Civil and Political Rights

Distr.: General
16 May 2005

Original: English

Human Rights Committee
Eighty-third session

Summary record of the 2255th meeting
Held at Headquarters, New York, on Monday, 14 March 2005, at 3 p.m.

Chairperson: Ms. Chanet

Contents

Consideration of reports submitted by States parties under article 40 of the Covenant and of country situations (*continued*)

Second periodic report of Kenya

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within one week of the date of this document* to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of the public meetings of the Committee at this session will be consolidated in a single corrigendum, to be issued shortly after the end of the session.

05-27065 (E)

The meeting was called to order at 3.10 p.m.

Consideration of reports submitted by States parties under article 40 of the Covenant and of country situations (*continued*)

Second periodic report of Kenya
(CCPR/C/82/L/KEN and CCPR/C/KEN/2004/2)

1. *At the invitation of the Chairperson, the delegation of Kenya took places at the Committee table.*

2. **Mr. Wako** (Kenya), introducing his country's second periodic report (CCPR/C/KEN/2004/2), said that its late submission, which he regretted, was not due to a lack of commitment to human rights, but rather to insufficient financial, technical and human resources and his Government's focus on urgent and all-consuming political, constitutional, legal and economic reforms. A professional staff had since been trained to assist an Interministerial Committee in ensuring compliance with Kenya's periodic reporting obligations under international treaties. The Committee was composed of representatives of key ministries, civil society organizations and the Kenya National Commission on Human Rights. Members of the National Commission were present at the meeting.

3. Since the submission of its initial report, Kenya had held its first multiparty general elections, in December 1992. In 1997, the Government had launched a constitutional review process aimed at achieving eight objects, including good governance, constitutionalism, the rule of law, respect for human rights and gender equality. The draft Constitution, elaborated by the National Constitutional Conference and still being debated by Parliament, would be submitted for a referendum. The draft bill addressed a number of human rights issues, including the denial of women's right to confer nationality and citizenship on their spouses and children and the inadequate protection of social, economic and cultural rights. Some 15 task forces and committees, including the Inter-Party Parliamentary Group, had been set up to carry out an ambitious legislative reform programme with the active participation of civil society organizations.

4. In 2003, the Kenya National Commission on Human Rights had been established as an independent entity empowered to investigate complaints, visit prisons and related facilities, raise public awareness and recommend measures for the promotion of human rights and the formulation and implementation of human rights programmes. Under the proposed constitutional revisions, the Commission would enjoy the status of a constitutional commission and would consist of a Chairperson, the Human Rights Commissioner, the People's Protector, a Minority Rights Commissioner and six other members with expertise in matters relating to children, persons with disabilities, basic needs and the elderly.

5. With a view to eliminating the extraction of confessions by torture, the Criminal Law (Amendment) Act 2003 recognized only confessions made in court and prohibited corporal punishment. The Children's Act incorporated the provisions of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child into domestic law. The Persons with Disabilities Act of 2003 provided for affirmative action in favour of persons with disabilities and established the National Development Fund for Persons with Disabilities. The National Commission on Gender and Development Act of 2004 established a commission to coordinate, implement and facilitate gender mainstreaming and national development. The National Commission was also responsible for advocating reforms to eliminate customs and practices that violated women's rights. Under the Community Service Orders Act, the courts were authorized to order community service in lieu of custodial sentences for petty offences, as a means of rehabilitating convicted persons and reducing congestion in prisons. The government had also launched a scheme for the release of 20,000 prisoners within the following months.

6. The Statute Law (Repeals and Miscellaneous Amendments) Act 1997 provided amendments to various pieces of legislation. An amendment to the Public Order Act, for example, eliminated the requirement of licence to hold a public meeting. Detention without trial provisions had been repealed under the Preservation of Public Security Act, which now specified that individuals could not be subjected to restrictions on account of their political beliefs or activities. The Sedition Laws had been removed from the Penal Code and the Government's power to ban publications had been severely curtailed. The Police Act, as amended, now required impartial and objective treatment of all persons arrested on political grounds, and prohibited torture or any other cruel, inhuman or

degrading punishment. Additionally, the draconian powers of police chiefs, a throwback to colonial times, had been withdrawn. A new section of the Chief's Authority Act prohibited police chiefs from engaging in the activities of political parties, and from applying torture or cruel, inhuman or degrading treatment or imposing solitary confinement. Under the amended Films and Stage Plays Act, the requirement to obtain a licence for theatre performances was lifted, and the Kenya Broadcasting Act had been amended to ensure balanced broadcasts across the political spectrum.

7. Lastly, a bill on family protection (domestic violence) and another on HIV/AIDS control and prevention had been submitted to Parliament for its consideration.

8. As part of the Government's policy to sign and ratify all relevant international and regional human rights instruments, Kenya had become one of the first four countries to participate in the peer review mechanism of the New Partnership for Africa's Development (NEPAD), which evaluated governance, the rule of law, justice and human rights issues and recommended remedial measures. In 1999, Kenya had invited the Special Rapporteur on Torture of the Commission on Human Rights to visit the country in order to assess the situation of torture. Most of the Special Rapporteur's recommendations had been implemented. The Special Rapporteur of the Subcommission on Promotion and Protection of Human Rights on adequate housing and its Special Rapporteur on corruption had also visited at the Government's invitation.

9. Kenya was considering making a declaration under article 22 of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in order to permit individuals to file complaints with the Committee. It was also contemplating ratification of the Optional Protocol to the International Covenant on Civil and Political Rights. The former Nyayo House torture chambers of the 1980s were being converted into an object of shame and an example of acts that must never be repeated.

10. Kenya's National Development Strategy for Wealth and Employment Creation (2003-2007), Poverty Reduction Strategy Paper and National Development Plan accorded priority to promoting good governance, the rule of law and respect for human rights as the foundation for economic growth. In that context, representatives of the key ministries, civil society organizations and the Kenyan National Commission on Human Rights had been appointed to a multisectoral steering committee to coordinate a national action plan for the promotion and protection of human rights. The plan would provide for a legal and policy framework to that end.

11. The Government was currently analysing weaknesses in the national institutions for the administration of justice, which lacked financial, technical and human resources and were plagued by corruption. With a view to restoring the integrity of the judiciary, tribunals of inquiry had been appointed to investigate the conduct of nearly half the judges of the High Court and about 65 per cent of the judges of the Court of Appeal; over eight magistrates had already been dismissed. Kenya had also been the first country to sign and ratify the United Nations Convention against Corruption. Other large-scale reforms in the judiciary and legal sectors included major restructuring to breed a culture of sensitivity to human rights issues, training programmes and the introduction of more effective methodologies.

12. Keenly aware that an environment of peace, law and order was a prerequisite to the enjoyment of human rights, Kenya had successfully hosted conflict resolution initiatives in both the Sudan and Somalia. Its Police Reform Task Force was also retraining police officers with a view to enhancing their sensitivity to human rights concerns in the execution of their duties. The establishment of an independent civilian oversight body to investigate complaints against police officers was also being contemplated.

13. **The Chairperson** invited the delegation to address the list of issues (CCPR/82/L/KEN).

Constitutional and domestic legal framework within which the Covenant is implemented (article 2 of the Covenant)

14. **Mr. Wako** (Kenya), referring to questions 1 to 3 on the list of issues, said that while the provisions of the Covenant had not yet been incorporated into domestic law, a number of its principles were embodied in the Constitution (for example, the Children's Act and the Persons with Disabilities Act). While the Covenant had not been invoked in court cases, court jurisprudence had become markedly more

progressive since the new National Rainbow Coalition Government had come into power in December 2002. There was every indication that the Covenant had been consulted in writing case law, particularly in the High Court.

15. The fundamental rights and freedoms guaranteed by the Covenant were protected by the Kenyan Bill of Rights. Thus, persons whose rights had been violated were entitled to seek legal redress in the High Court of Kenya and those who could not afford to do so were given financial assistance. In 2001, the Chief Justice of Kenya had issued the Protection of Fundamental Rights and Freedoms of the Individual (Practice) Rules, which facilitated complainants' access to the High Court. The large number of complaints pouring in had prompted the establishment of a permanent constitutional court within the High Court to deal exclusively with constitutional matters and judicial review. The Bill of Rights contained in the draft Constitution adopted in March 2004 focused intensively on the enforcement of fundamental rights and freedoms.

16. Kenya had adopted a number of statutes that to some extent implemented the obligations and principles contained in the Covenant, including the Children's Act, which prohibited discrimination against children on grounds of origin, sex, religion, colour, political, sexual and other criteria, the Criminal Law (Amendment) Act and the Community Service Orders Act referred to earlier. The draft Constitution also required the Government to fulfil its human rights treaty obligations, submit timely reports to international human rights treaty bodies and facilitate submissions by civil society organizations to international human rights bodies.

17. Kenya was actively considering acceding to the Optional Protocol.

Provision of effective remedies; impunity (article 2 of the Covenant)

18. Referring to question 4, he said that under the Constitution, any person whose fundamental rights and freedoms had been violated could seek compensation. The Kenya National Commission on Human Rights had a mandate to investigate alleged human rights violations and, where appropriate, recommend compensation for victims and their families. Only a week earlier, the courts had awarded substantial compensation to a person who had been wrongfully detained. Remedies were therefore in place and being applied.

Gender equality, discrimination (articles 3 and 26 of the Covenant)

19. Referring to question 5, he said that there were no legal restrictions on the right of women to equality in marriage, authority within the family, divorce and inheritance. However, there were cultural and social restrictions, which were being addressed in the new draft Constitution and by the National Commission on Gender and Development, which was responsible for advocating for legal reform on women's issues.

20. Referring to question 6, he said that rules on citizenship in the cases mentioned were indeed incompatible with articles 3 and 26 of the Covenant. The new draft Constitution, however, provided that any person married to a Kenyan citizen for at least seven years was entitled to citizenship and that citizenship was no longer lost through marriage or the dissolution thereof.

21. Referring to question 7, he said it could not be denied that gender disparities existed, for historical reasons. The Government was taking steps to address the under-representation of women in decision-making bodies and, in 2003, women had accounted for around one fifth of deputy permanent secretaries, ambassadors and high commissioners. For the first time, under the National Rainbow Coalition (NARC) Government, Kenya now had three female Cabinet members, a huge step forward that demonstrated how seriously the Government took women's issues. Indeed, the NARC party had nominated only women to Parliament. Moreover, almost half the members of the Kenya Human Rights Commission and the Law Reform Commission, and three quarters of the staff of the Office of the Attorney-General were women. The new draft Constitution included a proposal that 50 per cent of the members of Parliament should be women. The Commission on Human Rights and Administrative Justice would also include an expert on women's affairs.

Derogation from rights (articles 4 and 5 of the Covenant)

22. Referring to question 8, he said that the Constitution spelled out a number of special circumstances under which fundamental rights and

freedoms might be derogated from, namely, when the country was at war or when emergency powers were being exercised under the Preservation of Public Security Act. In the latter case, such derogation was subject to parliamentary approval. A state of emergency had existed in North Eastern Province until 1997 in response to security concerns relating to banditry. It had, however, now been lifted and the two related Acts repealed.

Right to life (article 6 of the Covenant); prohibition of torture (article 7 of the Covenant)

23. Referring to question 9, he said that under the Penal Code the death penalty was mandatory for anyone found guilty of murder, treason, robbery with violence or attempted robbery with violence. Parliament had twice debated whether Kenya should abolish the death penalty. On the first occasion, an overwhelming majority had voted against the proposal. By the second debate, support for abolition had increased but had still been insufficient. There had also been an intense discussion of the issue during the National Constitutional Conference, which had been attended by members of Parliament and representatives of a broad spectrum of society. The Constitutional Review Commission had included the abolition of the death penalty in its initial draft, but the proposal had been rejected by the Conference. Kenya was moving closer to abolishing the death penalty, but was not there yet.

24. Referring to question 10, he said that police shootings did occur and had recently increased owing to an upsurge in crime and to the proliferation of small arms, many of which entered Kenya from neighbouring countries. The Government's policy, however, was clear and fully in line with United Nations guidelines concerning reasonable force. When police shootings were fatal, he always ordered a public inquest.

25. Referring to questions 11 and 13, he said that the Penal Code was already very clear on the question of torture. Under new legislation, any police officer who subjected a person to torture or other cruel, inhuman or degrading treatment was guilty of a felony. Moreover, confessions must now be made before the court.

26. Referring to question 12, he said that the number of deaths in custody, excluding executions, had fluctuated between 529 and 769 per year for the period 2000-2003. The statistics did not, however, specify the causes of those deaths. In his view, many if not most of the detainees concerned had died as a result of the poor conditions in Kenyan prisons, particularly extreme overcrowding. In any case, under the Prisons Act, deaths in custody were subject to an inquest. Where detainees had died as a result of torture, or had been killed deliberately by prison wardens, action had been taken.

27. Referring to question 14, he said that the Penal Code permitted abortion only when it was necessary for the protection of the pregnant woman. Abortion was a very emotional issue in Kenya and a number of prominent members of Kenyan society were very vocal in expressing their views.

28. Referring to questions 15 and 16, he said that gender abuse and sexual violence against women and girls continued to be widespread. The Government and non-governmental organizations (NGOs) had intensified their efforts to address the issue, with the result that reported cases of rape and attempted rape had more than doubled between 1997 and 2003, while reported cases of assault and battery had risen by around one third. Various organizations provided legal advice and support for victims of abuse and injustices such as battery, rape, forced early marriage and female genital mutilation. The organization FIDA was particularly active and in 2003 had taken over 200 cases to court. A number of NGOs had also set up shelters for victims of sexual violence.

29. A major education campaign was needed concerning the health hazards of female genital mutilation, which was practised by a number of tribes in Kenya. Surveys had shown that mothers were often the ones advocating or even carrying out the procedure. The issue had been debated in Parliament in 1997 but several members had strongly objected to his claim that the practice was primitive and must be punished. The Ministry of Gender, Sports, Culture and Social Services, along with a number of female members of Parliament, was in the process of visiting rural communities in order to raise awareness and female circumcision was gradually being replaced by other, more peaceful rites and ceremonies. Under the Children's Act, it was unlawful for girls under the age of 16 to undergo the rite.

30. A government task force had reviewed all Kenyan laws and traditional practices to identify those that kept women from enjoying equality with men, and it had

addressed the specific issue of domestic violence, which, as suggested in question 16, was indeed on the rise. At the current session, Parliament had reintroduced the Family Protection (Domestic Violence) Bill, defeated in 1992 by the male-dominated body because of contentious provisions, such as the issuance of a restraining injunction against a violent spouse that would bar him from entering his own house, which was regarded as an unacceptable breach of rural customs. Currently, the Ministry responsible for gender together with civil and non-governmental organizations, was addressing such concerns in advance and trying to get the bill through Parliament. If enacted, that legislation would suffice to deal with domestic violence in Kenya, and would be a model for such legislation in other African countries.

31. Prisons, as suggested in question 17, were indeed overcrowded to the point of being uninhabitable. The new scheme allowing courts to replace prison sentences by community service sentences, involving supervised work on public construction projects, should alleviate some of the overcrowding. The main factor, however, was that 65 per cent of the prison population consisted of persons remanded in custody while awaiting trial, some of whom, because of court delays, were held in prison for longer periods than the sentences they would have received if they had been convicted. In a series of prison reforms that had attracted international recognition, courtrooms had been set up in some of the prisons so that magistrates could close long-standing pretrial detention cases, and thus release many thousands of prisoners. Furthermore, under the Ministry of Justice's Law and Justice Training Programme, new magistrates were being instructed not to automatically incarcerate prisoners awaiting trial, and the budget for prison construction was being expanded.

Security of the person, freedom from arbitrary arrest (article 9 of the Covenant)

32. Referring to question 18, he said that in addition to the laws and regulations governing arrest and pre-trial detention, the Constitution stipulated that detainees must be informed as soon as practicable, in a language they understood, of the reasons for their arrest or detention. Persons arrested were held in police cells pending their court appearance. In practice, however, the length of pretrial detention sometimes exceeded the legal limits, in part because of resource constraints, both human and material.

33. **The Chairperson** invited the Committee to pose additional questions to the delegation concerning questions 1 to 18 on the list of issues.

34. **Mr. Shearer** said he hoped that the report — produced under some compulsion, since the Committee had been ready to consider the situation in Kenya in the absence of a report — would inaugurate a new chapter in the relations between the Committee and the State party.

35. The general issue of corruption, which was acknowledged in both the oral introduction and the written responses to the list of issues, and which, if anything, was reportedly worse under the current administration, was a matter of deep concern to the Committee and the international community. Corruption affected the whole fabric of a country, with profound implications for Covenant rights. Beyond the Government's policy of zero tolerance towards corruption as referred to by the delegation, what had the Government done to address it, and was there any institution in place — a watchdog committee or an official appointed to report to Parliament — to take action against corruption?

36. The status of the Covenant within Kenya's legal system — a totally separate issue from accession to the Optional Protocol — and the possibility of invoking it in the courts should be clarified. The delegation had implied that appeals could be made on the basis of the Covenant, and should give information about any such instances.

37. He would like to hear more about the Law and Justice Training Programme to educate magistrates concerning arrest and detention procedures and would appreciate an explanation of why 14 days of pretrial detention were allowed in suspected capital cases as against the usual 24-hour rule.

38. Furthermore, it was not clear whether and when the National Commission on Human Rights had been established by statute, whether it was fully operative, and whether the Commission on Human Rights and Administrative Justice contemplated in the proposed new Constitution was the same body.

39. **Mr. Glele Ahanhanzo**, observing that the delegation's oral introduction and replies to the list of issues showed Kenya's clear intention to comply with

the Covenant, said that, as always in an African country, the solutions and approaches to upholding any legal system had to be distinctively African ones.

40. On the question of gender equality, he would like to know what practical steps were being taken to safeguard the property and inheritance rights of women, especially in the rural areas. It would be interesting to know how many women were members of the National Commission on Gender and Development. The representation of women in decision-making government bodies was encouraging, but information should also be provided about their representation in positions of power in the private sector. Data would also be useful on the education of women at all levels, as would more information about measures to remedy gender inequality, other than the affirmative action envisaged under the draft Constitution.

41. He wondered what specifically was being done to change public attitudes concerning the practice of female genital mutilation, particularly among adults who were beyond the reach of the schools, and to what extent civil society organizations were participating in the Government's consciousness-raising campaign.

42. **Mr. Rivas Posada** observed that a delay of 25 years in reporting made it hard for the Committee to study the human rights situation in the State party.

43. Although apparently no state of emergency had been declared since 1976, it would be interesting to know what the constitutional provisions in the matter were: for instance, whether the constitutionality and legitimacy of declarations of a state of emergency or of Presidential derogations from certain rights could be challenged in the courts. It was not clear if a presidential order of a state of emergency had to be regularly extended every 28 days or if approval by the National Assembly made the order permanent until it was revoked; the question of whether the Assembly had the power, before the initial 28 days were up, to revoke a presidential order or modify the provisions of a presidential declaration extinguishing certain rights should also be clarified. Lastly, did the Constitution or the Preservation of Public Security Act actually specify which articles of the Covenant were not subject to derogation?

44. **Mr. Castillero Hoyos** requested an explanation for any differences that might exist between the procedural guarantees for persons accused of "armed robbery with violence" and those accused of murder or treason. The question also arose whether holding prisoners on death row for some 15 years might not be considered inhuman and degrading treatment. He wondered whether consideration had been given to establishing an independent mechanism, separate from the police force, to investigate police policies and actions, and why police statistics on the excessive use of force were different from those of independent sources. How was the human rights manual applied by the police, and what measures were planned to bring police action into line with United Nations standards?

45. It would be useful to know how many complaints of torture had been submitted in the previous five years and how the Kenyan Commission on Human Rights could provide real guarantees against torture without sufficient resources. He requested information on the secret police and whether its agents were those mainly responsible for acts of torture. Was torture also committed by the armed forces and, if so, how did the State party plan to deal with that situation?

46. The Government should indicate how it planned to deal with ethnic and tribal clashes and why more had not been done in that regard.

47. He wished to know what percentage of detainees had died in prison, whether that figure was acceptable and, if so, according to what criteria. When would additional figures be available on the mistreatment of prisoners?

48. Details should be provided on the results of the prohibition of abortion, in particular, the serious threat to the health and lives of women posed by illegal abortions, and the severe penalties, including the death penalty, for performing an abortion, especially given the limited access to contraception. Was there an awareness that poor women suffered most from that situation? He wondered whether cases of rape would be included in the draft Constitution as exceptions to the prohibition of abortion?

49. **Mr. Lallah** said that the State party must take the initiative in dealing with the customs and traditions which impeded the implementation of the Covenant. He noted that judges in Kenya did not refer to the Covenant when taking decisions and that the report had been drafted without taking into account the general comments or jurisprudence of the Committee.

50. He asked whether any anti-terrorism law had been adopted. Noting that the general application of the rights contained in articles 9, 18, 19 and 22 of the Covenant was an obligation of the State party, he asked whether any judicial powers had been transferred to the executive branch. When a state of emergency had been declared, had the reasons for doing so been explained? What rights had been suspended and what limits had been placed on the derogation from rights?

51. With regard to discrimination against women, the question arose whether the absence of gender equality as one of the fundamental rights guaranteed under article 70 of the Constitution constituted a violation of articles 3, 16 and 26 of the Covenant. Article 82 of the Constitution also contained countless limitations on the general prohibition of discrimination against women.

52. Referring to paragraph 109 of the Kenyan report, he asked how the rights protected under article 11 and article 14, paragraph 3 (g), of the Covenant could be guaranteed for a person imprisoned for indebtedness who refused to testify on his own behalf.

53. **Sir Nigel Rodley** requested information on the measures taken to ensure that the police did not have a monopoly over the issuance of forms for reporting allegations of abuse. In addition, he failed to understand the difficulties encountered by the delegation in obtaining statistics about the number of inmates on death row, as it should be sufficient to visit a Kenyan prison to determine the number of such inmates and the reasons for their confinement.

54. **Mr. Amor** pointed out that all the provisions of the Covenant must be respected under the domestic law of the State party, despite the influence of social and cultural forces and customary and Islamic law. In particular, discrimination against women, family law, corporal punishment, female genital mutilation and the rights of the child were areas of concern.

55. Further clarification should be provided concerning aspects of paragraph 7 of the report which might run counter to the Covenant; paragraph 40, on freedom of movement; paragraph 83, concerning the discretion of the courts; and paragraph 86, which appeared to indicate that a drug addict could, for example, lose all the rights protected by the Covenant.

The meeting rose at 6 p.m.